

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB 25 2008

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0242-PR
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
TIMOTHY FRANCIS HENRY,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR-2002-00954

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Edward G. Rheinheimer, Cochise County Attorney
By David R. Pardee

Bisbee
Attorneys for Respondent

Creighton Cornell, P.C.
By Creighton Cornell

Tucson
Attorneys for Petitioner

H O W A R D, Presiding Judge.

¶1 Following a jury trial, Timothy Henry was convicted of possessing a dangerous drug for sale, possessing drug paraphernalia, and possessing a deadly weapon as a prohibited

possessor. He was sentenced to aggravated terms of imprisonment totaling 10.5 years. This court affirmed his convictions and sentences on appeal. *State v. Henry*, No. 2 CA-CR 2004-0205 (memorandum decision filed Nov. 22, 2005). Henry then instituted post-conviction proceedings pursuant to Rule 32, Ariz. R. Crim. P.¹ In this petition for review, he challenges various actions by the trial court in those proceedings. Although we grant review, we deny relief.

¶2 Henry timely filed notices of post-conviction relief in May and June 2006 but never filed a petition for post-conviction relief. The trial court had granted him two extensions in which to do so but warned him it would grant no further extensions “absent extraordinary circumstances.” On January 9, 2007, it denied Henry’s third extension request when it found no such circumstances existed.

¶3 On January 17, 2007, Henry filed a motion to reconsider that decision. The trial court expressly deemed that motion a motion for rehearing pursuant to Rule 32.9(a) and denied it on January 25, 2007. Henry did not file a petition for review at that time. Instead, approximately a month later, he filed a “renewed” motion for more time to file a petition for post-conviction relief, which the trial court denied in May 2007. He then filed a “motion for clarification of findings of fact and law” and a motion to extend time in which to file a

¹We note that Henry mistakenly claims his Rule 32 proceedings were “of-right.” Only a “person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest shall have the right to file a post-conviction relief proceeding . . . known as a Rule 32 of-right proceeding.” Ariz. R. Crim. P. 32.1. Henry had had a jury trial and a direct appeal. This was not an “of-right proceeding.”

petition for review. On June 5, 2007, the trial court denied the motion for clarification, stating that its January rulings had sufficiently explained its reasons for denying Henry more time to file a petition for post-conviction relief and noting that “[n]othing in the renewed [motion for extension of time had] . . . justified revisiting the previous orders of the Court.” The trial court denied the motion to extend time for filing a petition for review on June 15, 2007.

¶4 Henry filed this petition for review on July 20, 2007, challenging the trial court’s denial of his motion to extend time to file the petition for review, its January 9 and 25 denials of an extension of time to file a petition for post-conviction relief, and its refusal to appoint counsel. Our review of a trial court’s actions in Rule 32 proceedings is discretionary, Ariz. R. Crim. P. 32.9(f); *Montgomery v. Sheldon*, 182 Ariz. 118, 120, 893 P.2d 1281, 1283 (1995), and we address only the first issue. Rule 32.9(c) vests the trial court with discretion to extend the time for filing a petition for review. As explained below, we find no abuse of discretion in the trial court’s denial of more time to file this petition for review.² Therefore, the petition is untimely, and we need not address the other issues raised therein.

²We are not convinced that Henry properly challenged the trial court’s denial of more time to file a petition for review by filing an untimely petition for review. Typically, a petition for review challenges a trial court’s denial of post-conviction relief, not the denial of additional time for filing the petition for review. We believe a petition for special action would have been a more appropriate vehicle for raising the issue, but we address it here in the exercise of our discretion.

¶5 Rule 32.9(c) requires that a petition for review of the denial of post-conviction relief be filed “[w]ithin thirty days after the final decision of the trial court on the petition for post-conviction relief or the motion for rehearing.” The trial court’s January 9 order was a final order, and its January 25 order specifically deemed Henry’s motion for reconsideration a Rule 32.9 motion for rehearing on a final order. Henry filed his petition for review nearly six months beyond the deadline.³ The trial court has discretion to extend the deadline, but a petitioner has a “heavy burden in showing the court why [his or her] non-compliance with [Rule 32.9] should be excused.” *State v. Pope*, 130 Ariz. 253, 256, 635 P.2d 846, 849 (1981). And, although Rule 32 time limits are not jurisdictional, our supreme court has cautioned that “[m]ere inadvertence or neglect on the part of a party will not be considered a valid reason for allowing a party to avoid the strict time limits of Rule 32.” *Id.*

¶6 In this case, without explanation, Henry filed his motion for more time to file a petition for review nearly four months after the trial court had denied his motion for rehearing. He based the motion solely on a vague and unsupported assertion that his counsel’s “schedule of witness interviews, evidentiary hearings, and major pleading deadlines in several life/homicide cases and one capital habeas case, [was] very busy.” Henry did not meet his burden of showing excusable non-compliance with Rule 32, and the

³As stated above, the trial court ruled on Henry’s first motion to reconsider, which it deemed a motion for rehearing, on January 25, 2007. He filed this petition for review on July 20, 2007. To the extent Henry contends that June 5, 2007, the date of the trial court’s ruling denying his re-urged motion for an extension of time, was the proper date from which to calculate the time to file the petition for review, his petition was still filed beyond the thirty-day deadline.

trial court did not abuse its discretion in denying more time to file this petition for review.⁴

We therefore deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge

⁴We note Henry's suggestion that the trial court abused its discretion because it mistakenly believed it lacked authority to grant an extension after the deadline had already passed. Assuming that suggestion is correct, we may affirm the trial court when it reaches the correct result for any reason. *State v. Olquin*, 216 Ariz. 250, n.5, 165 P.3d 228, 231 n.5 (App. 2007). Because Henry clearly failed to meet his heavy burden of showing excusable non-compliance with Rule 32, we find no abuse of discretion in the court's denial of Henry's extension request.